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No. 93-1401

In The

Supreme Court of the United States

October Term, 1993

GEORGES V. ABI-GHANEM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

Of Counsel:

JUDITH RESNIK
Law Center
University of Southern California
University Park
Los Angeles, California
90089-0071
(213) 740-4789

WILLIAM J. GENEGO*
Suite 1000
100 Wilshire Boulevard
Santa Monica, California
90401-1198
(310) 394-5802

Counsel for Petitioner Georges V. Abi-Ghanem

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY ARGUMENT

This petition raises an important question of federal criminal procedure, going to the heart of the guilty plea hearing. Because multi-defendant cases are growing in number and because the circuits are split about what information must be provided to district judges about package plea conditions of plea agreements, this Court should grant this petition and decide its merits.

The record in this case does not pose any obstacles to the grant of certiorari; rather the issue is squarely presented. Accordingly, this case presents the Court with an appropriate opportunity to resolve the conflict that has developed among the circuits concerning the acceptance of guilty pleas in multi-defendant cases.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE LEGALITY OF NONDISCLOSURE OF PACKAGE PLEA CONDITIONS IN PLEA AGREEMENTS AND TO ENSURE UNIFORM ADMINISTRATION OF FEDERAL CRIMINAL PROCEDURE

The government's response to the petition for certiorari confirms the importance of the question presented and the need for this Court's review. Under current law, the information a district judge is provided to assess the voluntariness of a guilty plea in a multi-defendant case varies with the circuit in which that judge sits. Indeed, as the government acknowledges, the circuits have "adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is a part of a package deal." *See* Brief For The United States In Opposition, at 10 (hereafter "Govt. Opp.")

That situation is intolerable; the assessment of voluntariness of guilty pleas under Rule 11 of the Federal Rules of Criminal Procedure and under the Due Process Clause must be uniform across the nation. This petition presents the appropriate occasion upon which to decide whether, prior to accepting a plea as "voluntary," "knowing," and "intelligently" made, a district judge must be informed of the existence of a package plea condition in a plea agreement so as to be able to assess the defendant's plea.

A. Dr. Abi-Ghanem's Petition Is Not Procedurally Barred

The government attempts to deflect attention from the serious issues squarely presented in the petition by asserting that the merits do not matter because a possible procedural bar "counsels against granting further review in this case." Govt. Opp. at 8-9. The government argues that because Dr. Abi-Ghanem did not, either at his sentencing or in a direct appeal, challenge the non-disclosure of the package plea condition, this Court should deny the petition for certiorari. Govt. Opp. at 8-9. At the same time, as the government acknowledges, it has never before raised this issue. Govt. Opp. at 8.

Thus, on certiorari, the government asks this Court to confront two issues of waiver, neither of which have been developed below. This Court should decline the government's invitation to use the certiorari process to explore or act on – without a record – waiver issues for two reasons. First, because the government should not be encouraged to make waiver arguments belatedly and second, had the argument been made in a timely fashion, lower courts would also have concluded that Dr. Abi-Ghanem's claim is not barred.

The government waived any procedural bar claim when it failed to raise it both before the district court and later the court of appeals. Govt. Opp. at 8-9; *see United States v. Metzger,* 3 F.3d 756, 757 (4th Cir. 1993) *cert. denied,* 94 WL 96099 (1994). While this Court has the discretion to excuse the government's waiver (*see Schiro v. Farley,* 114 S. Ct. 783, 788-89 (1994)), it would be inappropriate to do so here. To permit the government to raise the claim now would be to sanction the insertion of an argument at a time when Dr. Abi-Ghanem is under the handicap of not having had the opportunity to develop an appropriate record. Thus, this Court should conclude that the government is estopped from raising such issues at this point in the proceedings. *See United States v. Turner,* 898 F.2d 705, 711 (9th Cir.) *cert. denied,* 495 U.S. 962 (1990). To do otherwise would be to encourage "sandbagging," and enable the government to wait until the opportunity for development of the record has ended to raise issues. *See Wainwright v. Sykes,* 433 U.S. 72, 89, 97 S. Ct. 2497, 2508, 53 L.Ed.2d 594 (1977).

Second, and more importantly, had the government raised the claim in a timely fashion, the lower courts would have concluded that Dr. Abi-Ghanem could establish both cause and prejudice. According to the government, Dr. Abi-Ghanem should have challenged the non-disclosure of the package plea condition of his plea agreement at his sentencing or by filing a notice of appeal within ten days of his sentencing (Fed.R.App.P. 4(b)) and raise the issue in a direct appeal. Govt. Opp. at 8. In his *pro se* § 2255 motion filed before the district court, however, Dr. Abi-Ghanem alleged facts which established cause for his failure to challenge the non-disclosure of the package plea condition at either of those stages – he had been denied effective assistance of counsel by his attorney's failure to advise him properly about the package plea condition and by the attorney's improper pressure to have him go along with the plea agreement. *See* Petitioner's Appendix at 89, 96-108 (hereafter "Pet. App.") A lawyer's failure to provide constitutionally sufficient representation establishes cause for the failure to challenge the package plea on direct review. *See Murray v. Carrier,* 477 U.S. 478, 488-89, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986).

Dr. Abi-Ghanem's § 2255 motion and supporting papers also established that he suffered prejudice from the non-disclosure of the package plea condition. Dr. Abi-Ghanem mistakenly believed that the package plea condition meant that if his codefendant wanted to accept the government's plea offer, he was required to do so as well; he would not otherwise have pled guilty. Pet. App. at 101-107. Had the package plea condition been disclosed to the district court, the district court would have questioned Dr. Abi-Ghanem about the condition during the Rule 11 hearing and Dr. Abi-Ghanem's mistaken understanding of the condition would have been corrected.

This Court has also concluded that there are rare cases in which, even if cause and prejudice could not be established, procedural defects should be excused, so as to avoid a fundamental miscarriage of justice. *See Sawyer v. Whitely,* 505 U.S. ___, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). As is detailed in both his § 2255 motion and in his earlier letter to the district court that was treated as a Rule 35 motion to the district court, Dr. Abi-Ghanem has stated that he was actually innocent. Dr. Abi-Ghanem's detailed analysis of why he was factually innocent thus provides an entirely

separate basis for excusing any procedural default that might have occurred. Pet. App. at 91; *see Sawyer v. Whitely, supra; Smith v. Murray,* 477 U.S. 527, 538-39, 106 S. Ct. 2661, 91 L.Ed.2d 434 (1986).

Finally, given the late stage at which the government has raised the issue of a possible procedural default, rather than deny the petition outright on that basis this Court at a minimum should vacate the judgment and remand to the district court for a hearing on the issue of whether there was a procedural default and whether there are grounds to excuse any such default.

B. The Different Procedural Rules Of The Circuit Courts Cause Unacceptable Differences In Rule 11 Hearings And In The Treatment And Outcome Of Post-Plea Proceedings

While acknowledging that the circuit courts have "adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is part of a package deal," the government argues that this Court's review is not necessary because the different rules "do not . . . lead to substantially different outcomes." Govt. Opp. at 10. The government is incorrect in two respects.

First, there can be no dispute that the different rules call for different procedures at the time of the taking of the plea. The United States government is under different obligations, circuit by circuit, to inform courts of package plea conditions, and a defendant in one circuit will be differently advised from a defendant in another circuit. The information that federal judges are provided in Rule 11 hearings should not vary but should be uniform; this Court's decision on disclosure would ensure that district courts in the first instance follow the same procedure during the Rule 11 hearing when considering pleas.

Second, the different procedural rules among the circuits do result in different outcomes in post-plea challenges. When a defendant in the First Circuit or Ninth Circuit raises the failure to disclose a package plea condition before sentencing, he or she is likely to have the plea vacated since those Circuits have held that disclosure is required. *See United States v. Caro,* 997 F.2d 657, 659-60 (9th Cir. 1993); *United States v. Daniels,* 821 F.2d 76,

78-79 (1st Cir. 1987). A defendant in the Second Circuit who raises such a claim prior to sentencing will not have grounds to have the plea vacated, but may receive a hearing at which to establish the plea should be vacated, given the Second Circuit's stated position encouraging disclosure. *See United States v. Clements*, 992 F.2d 417, 419 (2d Cir.) *cert. denied*, ___ U.S. ___, 114 S. Ct. 316, 126 L.Ed.2d 262 (1993). A defendant in the Fourth Circuit, however, is likely to receive "raise[d] eyebrows," but not more. *See United States v. Morrow*, 914 F.2d 608, 613-614 (4th Cir. 1990).

Moreover, even assuming as the government contends that to obtain post-conviction relief based on the failure to disclose a package plea condition, a defendant will have to prove that the failure to disclose the condition made his or her plea involuntary (Govt. Opp. at 10), the response to such challenges will vary depending on whether the circuit in which the claim is raised requires disclosure, encourages disclosure, or does neither.

C. This Court Should Establish A Uniform Rule That A Package Plea Condition Must Be Disclosed To The District Court At The Rule 11 Hearing

The government agrees that a package plea condition of a government plea offer is a factor that bears upon the voluntariness of a defendant's guilty plea. *See* Govt. Opp. at 10-11. Since the purpose of the Rule 11 hearing is to allow the district court to determine accurately whether a defendant's plea is voluntary, knowing, and intelligent, a package plea condition should be disclosed to the district court before it accepts a defendant's guilty plea.[1] As Judge (now Chief Judge) Breyer explained in *United States v. Daniels*, 821 F.2d at 78-79, a package plea condition is so

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[1] Disclosure of a package plea condition is also important and should also be required not only to ensure that a guilty plea is voluntary, but also to ensure that it is knowing and intelligent. *See Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257, 49 L.Ed.2d 108 (1976). Dr. Abi-Ghanem, as demonstrated by his § 2255 pleadings, incorrectly understood that the package plea condition meant that if his codefendant wanted to accept the government's offer and plead guilty, he would be required to do so as well. Pet. App. at 101-107. As noted above, if the package plea condition had been disclosed to the district court, Dr. Abi-Ghanem would have been questioned about the condition during the Rule 11 hearing and this mistaken understanding would have been remedied.

material to a plea bargain that failure to disclose it prevents the district court from adequately assessing the voluntariness of a plea. This same view was expressed by the Ninth Circuit in an opinion written by Judge Kozinski. *See United States v. Caro*, 997 F.2d at 659-70. Moreover, the conclusion that disclosure should be required to ensure that a defendant's plea is voluntary and also knowing and intelligent is supported by the absence of any counter arguments that justify keeping such a material term of a plea agreement secret from the district court.

Nevertheless, the circuit courts have not agreed that disclosure is required or even that it should necessarily be encouraged. As is fully discussed in Dr. Abi-Ghanem's petition for a writ of certiorari (at 19-29), the First Circuit and Ninth Circuit have ruled that disclosure is mandatory, *United States v. Daniels*, 821 F.2d at 78-79; *United States v. Caro*, 997 F.2d at 659-70; *cf. United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 322, 121 L.Ed.2d 242 (1992), the Second Circuit has encouraged disclosure and indicated that it is the preferred practice but has not made it mandatory, *United States v. Clements*, 992 F.2d at 419, and the Fourth Circuit has ruled that disclosure is not required and does not encourage or recommend disclosure. *United States v. Morrow*, 914 F.2d at 613-14.

While Dr. Abi-Ghanem believes that the opinions authored by Chief Judge Breyer in *Daniels* and Judge Kozinski in *Caro* state the appropriate rule, the existence of a conflict among the circuits warrants review by this Court so that a uniform rule is followed in all district courts for all defendants, regardless of the circuit in which they are prosecuted.

D. The Failure To Disclose The Package Plea Condition In This Case Requires At A Minimum That Dr. Abi-Ghanem Be Given An Evidentiary Hearing At Which He Would Have The Opportunity To Establish That His Plea Was Involuntary

The government also attempts to discourage review in this case by arguing that "there is no substantial factual question that petitioner's plea was voluntary." Govt. Opp. at 11. Like its argument on procedural bar, the government here tries to turn this Court – at the certiorari stage – into a trier of fact. While the

government predicts the outcome of a hearing to which Dr. Abi-Ghanem should be entitled, that prediction is erroneous: to the extent they are relevant, the factors cited by the government support Dr. Abi-Ghanem's claim that his plea was involuntary.

The government first attempts to rely on the transcript of the plea colloquy to demonstrate the "voluntariness" of Dr. Abi-Ghanem's plea. Govt. Opp. at 11-12. The issue of voluntariness raised here however, turns on the package plea condition, which was not disclosed to the district court. Of course, the plea transcript does not discuss that which was not disclosed; no mention is made of the package plea condition, and that is the problem.[2]

Second, the government relies on the assertion that Dr. Abi-Ghanem is "highly educated [and] commercially sophisticated" to support the voluntariness of the plea. Gov't. Opp. at 12. A defendant's education does not make a plea voluntary, nor relieve the prosecution from disclosing material information to the district court. Moreover, while Dr. Abi-Ghanem is a highly qualified scientist, he has no substantial experience in matters of commerce and his training as an engineer does not make him "sophisticated" in federal criminal procedure for jointly tried defendants. In fact, the record demonstrates Dr. Abi-Ghanem's inexperience in this area; his affidavit in support of his § 2255 motion stated that he was completely unfamiliar with the practice of plea bargaining until two days before his trial was scheduled to begin. *See* Pet. App. at 96 ("I did not know that such a thing could happen in the legal system.")

The third factor cited by the government by which it attempts to prove voluntariness is that, it claims, Dr. Abi-Ghanem was represented by "experienced counsel." Govt. App. at 12. But, as Dr. Abi-Ghanem explained in his § 2255 motion, his lawyer provided constitutionally inadequate representation and allowed Dr. Abi-Ghanem to be subjected to the pressure of his co-defendant's

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[2] To the extent the existing plea colloquy might be seen as relevant to the issue of voluntariness raised here, the "strong presumption of verity" that statements during the colloquy ordinarily carry (Govt. Opp. at 12), is overcome in this case because Mr. Abi-Ghanem has written proof that his attorney coached him with a "crib sheet" as to how to answer the court's questions to insure the plea would be accepted. *See* Pet. App. at 118.

attorney. Pet. App. at 101. That lawyer, despite a serious conflict of interest, exerted improper pressure on Dr. Abi-Ghanem to accept the package plea offer. Pet. App. at 101. The fourth point raised by the government is that the plea was entered "after six months of preparation for trial." Govt. Opp. at 12. Once again, that fact does not illuminate the question of voluntariness. As Dr. Abi-Ghanem explained in his § 2255 motion, he had expected for six months to proceed to trial and not until two days before trial did his attorney discuss a plea with him. The package plea condition was first made known to him at that time. *See* Pet. App. at 97.

The relief Dr. Abi-Ghanem is entitled to, at a minimum, is a hearing before the district court on his claim that the failure to disclose the package plea condition to the district court resulted in his plea being neither voluntary, knowing or intelligent. While there is little point or relevance to speculating about the outcome of such a hearing at this time, the available evidence strongly suggests that Dr. Abi-Ghanem would prevail.

II. THIS COURT SHOULD GRANT REVIEW TO EXERCISE ITS SUPERVISORY POWERS TO ENSURE THAT THE INTERMEDIATE APPELLATE COURTS DO NOT AVOID THEIR OBLIGATION TO PROVIDE APPELLATE REVIEW AS REQUIRED BY LAW

In its attempt to justify the summary affirmance, the government asserts that it was appropriate for the court of appeals to issue a summary affirmance "[i]n light of the district court's treatment of the issues presented here." Gov't. Opp. at 13, citing Pet. App. at 4-6. As Dr. Abi-Ghanem explained in his briefs to the court of appeals and in his petition for a writ of certiorari to this Court, the district court actually completely misconstrued the claim in his § 2255 petition concerning the non-disclosure of the package plea condition. The district court construed this claim only as an allegation that a package plea condition was, *per se,* prosecutorial misconduct (Pet. App. at 6), even though Dr. Abi-Ghanem made no such an argument. Thus, contrary to the government's assertion, the court of appeals' summary affirmance of the denial of the petition, affirming as it did the district court's misconstrued ruling, illustrates the need for this Court to exercise its supervisory powers to

provide guidance on the much debated issue of unpublished opinions and summary affirmances. *See* Gilbert S. Merritt, "Judges on Judging," 51 *Ohio St. L. Journal* 1385 (1990); Daniel K. Hoffman, "Nonpublication of Federal Appellate Court Opinions," 6 *The Justice Journal* 405 (1981); William L. Reynolds & William M. Richman, "The Non-Precedential Precedent – Limited Publication and No Citation In the United States Courts of Appeals," 78 *Columbia L. Rev.* 1167 (1978).

Despite the government's assertions, Dr. Abi-Ghanem is not arguing that he has a private right of action under the internal rules of the appellate courts. *See* Gov't. Opp. at 12-13. What he asks is for this Court to exercise its supervisory authority, as it has done in the past, to ensure that litigants before a circuit court know the practices of that court. As this Court explained in *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 73 S. Ct. 656 (1953), "[i]t is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice – whatever it may be . . . " *Id.* 345 U.S. at 260-61, 73 S. Ct. at 663. (Although rejecting the petitioner's challenge to the circuit court's en banc procedures, the Court remanded for the appellate court to make clear the procedure to be followed in seeking and responding to requests for en banc hearings. *Id.* 345 U.S. at 268, 73 S. Ct. at 666.) Whatever the procedure might be in the Eighth Circuit and other circuits for accomodating the pressures resulting from increased appellate case loads with the appellate courts' lawmaking functions, that procedure should be made clear to the public and the litigants who appear before the court. Accordingly, this Court should grant review to ensure that the circuit courts, in their efforts to adopt innovative procedures to provide justice to an expanding number of litigants, do not do so in a manner that undermines the statutorily protected right of a direct appeal.[3]

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[3] Other cases cited by the government also provide examples of appropriate exercises of this Court's supervisory powers. For instance, in *Taylor v. McKeithen*, 407 U.S. 191, 92 S. Ct. 1980. 32 L.Ed.2d 648 (1972), the Court, while fully recognizing the "wide latitude" of the circuit courts on "whether or how to write opinions," granted certiorari, vacated the judgment and remanded the case to the court of appeals so that it could explain the reasons for reversal without opinion. *Id.* 407 U.S. at 194, n.4.

CONCLUSION

For all the foregoing reasons, as well as those presented in Dr. Abi-Ghanem's petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the questions presented in the petition.

Respectfully submitted,

Of Counsel:

JUDITH RESNIK
Law Center
University of Southern California
University Park
Los Angeles, California
90089-0071
(213) 740-4789

WILLIAM J. GENEGO*
Suite 1000
100 Wilshire Boulevard
Santa Monica, California
90401-1198
(310) 394-5802

*Counsel of Record